IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3189 OF 2004

1. Joseph Bain D'Souza
2. Cyrus J. Guzder
3. Shirish B. Patel .. Petitioners

V/s

1. State of Maharashtra
   through the Secretary,
   Urban Development Department

2. Municipal Corporation of Greater
   Mumbai

3. Maharashtra Housing and Area
   Development Authority

4. D.M. Sukthankar .. Respondents

AND

1. Jayant Achyut Sathe
2. Property Owners' Association
3. M.K. Kelkar
4. Prashant Relekar
5. Property Redevelopers' Association
6. Sashikant Patil

And others .. Interveners

WITH

Chamber Summonses No.276/04, 278/04, 279/04, 307/04, 309/04, 312/04, 319/04, 324/04, 9/05, 22/05, 38/05, 53/05, 299/06, 300/06

Mr. Aspi Chinoi, Senior Advocate with Mr. Gautam Patel and Mr. Sharan Jagtiani i/b Thakore Jariwala & Associates for the Petitioners.

Mr. Ravi Kadam, Advocate General with Mr. G.W. Mattos, A.G.P. for Respondents No.1 and 3.

Mr. K.K. Singhvi, Senior Advocate with Mr. Suresh Pakale and Ms. Preeti Purandare for Respondent No.2.

Respondent No.4 served.

Mr.T. Subramaniam, Senior Advocate with Mr.Chirag Balsara i/b M/s Vanita Kakar, Kachwaha and Partner for Intervener No.1.

Mr.Devrajan with Ms.Mrudula Kadam with Mr. Ashok Rajgopalan and Mr.George Das i/b Vimadalal & Co. for Intervener No.2.

Mr.A.N. Jakhadi for Intervener No.3.

Mr. J. Reis with Mr. Vimal Tiwari for Intervener No.4.

Mr. Y.M. Choudhari for Intervener No.5.

Intervener No.6 in person.

Mr.Dharam Sharma for the Intervener - Mumbai Bhadekari Ekta Sangh.

Mr.A.N. Jakhadi for the Intervener - Girgaum Shri Swami Samarth Co-operative Housing Society Ltd. & Ors.

Mr. Manoj Thatte for the Intervener Mr. Rajaram Tukaram Amkar.

Other interveners are served.

CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.

DATE OF RESERVING THE JUDGMENT : 23RD NOVEMBER 2006

DATE OF PRONOUNCING THE JUDGMENT: 11TH DECEMBER 2006

JUDGMENT: (Per H.L. Gokhale, J.)

1. This writ petition has been filed by three citizens of Mumbai in public interest. The petition seeks to challenge the legality of Regulation No.33(7) of the Development Control Regulations, 1991 for the city of Mumbai, as amended in the year 1999, to the extent it provides amongst others that the buildings owned by private landlords in the island area of the city and covered for reconstruction thereunder are

permitted Floor Space Index (FSI) of 2.5 or the FSI required for rehabilitation of existing tenants plus incentive FSI (as specified in Appendix III to the Regulations) whichever is more. The Petitioners have raised various grounds and invoked Article 14 of the Constitution of India for this purpose.

2. The three Petitioners are public spirited citizens. The 1st Petitioner is a former Municipal Commissioner of Mumbai, who is also a former Chief Secretary of the State of Maharashtra. The 2nd Petitioner has been a member of various committees concerning urban development. The 3rd Petitioner is a Civil Engineer by profession and for quite many years was an Executive Committee Member of the Bombay Metropolitan Authority. He was also a member of the Slum Rehabilitation Committee constituted by the State of Maharashtra.

3. Respondent No.1 to this petition is the State of Maharashtra through the Secretary, Urban Development Department. Respondent No.2 is the Municipal Corporation of Greater Mumbai, which is the Planning Authority for the city of Mumbai under the Maharashtra Regional and Town Planning Act, 1966 whereunder these Regulations are framed. Respondent No.3 is a statutory authority constituted under the Maharashtra Housing and

Area Development Act, 1976. It is an Act with a comprehensive approach towards the problem of housing development including repair and reconstruction of the dilapidated buildings in the city. Respondent No.4 is a former Municipal Commissioner of Mumbai whose report has, amongst others, led to the amendments to the D.C. Regulations in the year 1999.

4. A number of parties have intervened in this matter. Thus, Interveners No.1 and 3 are property owners. Intervener No.2 is the Property Owners' Association. Intervener No.4 claims to be a tenant in a pre-1940 building. Intervener No.5 is Property Redevelopers' Association. They are all opposing the reliefs in the petition. Intervener No.6 is an architect by profession who has intervened in the petition to support this petition. All those interveners have appeared either through their counsel or on their own. There have been other interveners in this matter who have filed their chamber summonses (applications) for intervention, but have not caused any appearance at the time of hearing.

5. A judgment has been rendered earlier in this petition by a Division Bench of this Court on 17th October 2005. The Division Bench accepted a number of grievances which have been canvassed in this petition and, amongst others, appointed a few committees to look

into some such aspects which, according to it, had relevance for the issues highlighted in the petition. One of the interveners, Jayant Achyut Sathe, filed Special Leave Petition (Civil) No.1376 of 2006 which was numbered as Civil Appeal No.2970 of 2006. Some other parties had also filed similar appeals. The Apex Court passed an order on this appeal on 14th July 2006 and observed that it was not clear as to whether the writ petition had been disposed of by the High Court or not. Hence, while keeping the appeal alive, it directed the High Court to deal with the basic issues raised in the petition. The Apex Court further observed -

> "The High Court has not dealt with the basic issues raised in the petition, i.e. as to whether the amended Regulation 33(7) suffered from any infirmity. We, therefore, think it appropriate to direct the High Court to examine those issues. The parties shall be permitted to place their respective stands before the High Court. It is open to the appellants to canvass before the High Court as to the non-maintainability of the Writ Petitions. The High Court shall appropriately deal with the same. It needs no reiteration that the High Court shall examine the challenge to Regulation 33(7) as amended in 1999."

The Apex Court has thereafter made it clear that the High Court shall deal with only the issue relating to the validity of the provisions and the maintainability of the writ petitions.

6. A few parties had filed intervention applications before the Apex Court. Those applications were also directed to be dealt with by the High Court and the High Court was to dispose of the matter within 3 months from the date of receipt of the order. It is material to note that this order of the Apex Court refers to an interim order passed earlier on 21st April 2006 whereby the Apex Court had directed that no third party rights shall be created without leave of the Apex Court. That order has been continued to be in operation till the disposal of the matter by the High Court and it is then observed that thereafter it will be for the High Court to deal with that aspect.

7. After this order was passed by the Apex Court, it was listed before different Benches, but could not be taken by them for some reason or the other. Thereafter it was listed before this Bench first on 18th September 2006. Mr.Gautam Patel, learned counsel for the Petitioners, pointed out that the interveners will have to be informed about this matter being taken up. He

assured to file their addresses with the office of the Prothonotary & Senior Master, who was directed to give notices to all of them to appear on 9th October 2006 when the matter was to be notified for reporting service of notices. Mr.Patel offered to give notices to them directly on behalf of the Petitioners also. The matter thereafter appeared on 9th October 2006 as directed when some of the interveners appeared before this Court and caused appearance. Mr.Patel filed an affidavit of service to prove the service. Two of the applicants, i.e. Jayant Achyut Sathe and Moreshwar Kelkar, had taken out chamber summonses No.300 and 299 of 2006 for intervention. They were specifically allowed by the orders passed on that day and the matter was adjourned to 8th November 2006 for hearing. Chamber summonses have been taken out by some other interveners bearing Nos.276/04, 278/04, 279/04, 307/04, 309/04, 312/04, 319/04, 324/04, 9/05, 22/05, 38/05 and 53/05. They were not present in spite of taking out chamber summonses. The matter was heard thereafter from 8th November 2006 from time to time and the hearing was concluded on 23rd November 2006.

8. The petition has been opposed by filing replies on behalf of the contesting Respondents. Thus, for the State of Maharashtra, Shri Ramanand Tiwari, Principal Secretary of the Urban Development Department, has filed an affidavit in reply affirmed on 19th January 2005.

Shri M.S. Rao, Chief Engineer, Development Planning, has filed a reply for the Municipal Corporation which was affirmed on 13th December 2004. Shri S.T. Karande, Chief Officer of the Mumbai Building, Repairs and Reconstruction Board has filed a reply affirmed on 20th January 2005. The Petitioners have filed their rejoinders to these replies. As far as the interveners are concerned, one Priyavadan Bhat has filed a reply affirmed on 15th January 2005 for the Property Owners' Association. Some other interveners have also filed affidavits in that behalf. In view of the order passed on the chamber summonses taken out by Jayant Achyut Sathe, the affidavit in support thereof was directed to be treated as his reply to the petition.

9. A chronology of dates and events and written submissions have been filed on behalf of the Petitioners, the State of Maharashtra and the Municipal Corporation. As far as the interveners are concerned, the Property Owners' Association, Jayant Achyut Sathe and Prashant Relekar have filed their written submissions. Shri Shashikant Patil, an architect by occupation, who has intervened in this petition to support the petition, has also filed his written submissions. A number of reports have been filed by both the parties. All of them have relied upon a number of authorities. We have considered all this material as also the submissions of the counsel appearing for all of

them as well as the intervener in person.

THE QUESTION OF VALIDITY OF D.C. REGULATION 33(7):

10. As noted earlier, the petition seeks to challenge the validity of the D.C. Regulation 33(7) as amended in the year 1999 on various grounds.

11. The Petitioners are concerned with the problem of congestion of the population in the island city of Mumbai. The island area of the city covers the area from Colaba in the South to Mahim and Sion in the North (which originally consisted of eight islands before they were all linked). The areas of suburbs and extended suburbs are not covered when one speaks of the island city. The existing infrastructure in the island city, particularly with respect to roads, water supply, sewage system, open areas and gardens, is already over stretched and under extreme strain. The Petitioners point out that the island city has already reached the saturation point with respect to the population that it can accommodate, which is not disputed by any of the public authorities concerned. According to the report entitled "Report on the Development Plan of Greater Bombay, 1966", the total acreage of the island city is 17,388.83 acres and the ultimate population, which it can accommodate, is 32.5 lakhs. As of now, the existing population of the island city is already in excess of

this figure of ultimate population. It is now estimated to be 33.4 lakhs. It is another matter that the population in the suburbs is much more, but the area over there is also much more than the island city. The petition is concerning only the island city.

12. There is no dispute whatsoever that the present public amenities are inadequate to cater to the present population. Hence, according to the Petitioners, any cause for the increase in the population in the island city has to be appropriately dealt with. Coupled with this deterioration of the infrastructure in the island city, it is also a fact that a very large number of buildings, i.e. more than 16,500 (16,502 according to one estimate) were constructed prior to 1940 and are in the need of urgent repairs and in some cases reconstruction. The State has taken it upon itself to see to it that these buildings are repaired and, wherever necessary, reconstructed and for that purpose, it created the Bombay Building, Repairs and Reconstruction Board by passing the Bombay Building, Repairs and Reconstruction Board Act (Act No.XLVII of 1969). One of the main reasons for this large number of unattended buildings has been the freezing of the rent under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("the Bombay Rent Act" for short). Rents received by the landlords were found very much

insufficient for them to carry out repairs.

13. The Bombay Building, Repairs and Reconstruction Board Act was later on repealed and the activities under the Act were taken over by the Maharashtra Housing and Area Development Authority (MHADA) when the Maharashtra Housing and Area Development Act (MHAD Act) was passed in 1976. A cess was to be contributed by the tenants of the private buildings known as Mumbai Building, Repairs and Reconstruction Cess under section 82 of the said Act. Lands and buildings owned by the Central Government, State Government, Municipal Corporation of Mumbai, Mumbai Port Trust, lands and buildings vested in MHADA, lands and buildings of the Public Trusts exclusively occupied for worship or educational purposes and those vested in or leased to a cooperative society, buildings exclusively in occupation of the owner, buildings exclusively used for non-residential purposes and some other properties as mentioned in section 83 were exempted from this requirement of paying the cess. These cessed buildings were divided into the following three categories under section 84 of the MHAD Act:

Category "A"	:	Buildings erected prior to 1/9/1940
Category "B"	:	Buildings erected between 1/9/1940 and 31/12/1950
Category "C"	:	Buildings erected between 1/1/1951 and 30/12/1969

It appears to be the common case that as of now as per the affidavit of the State Government in the present matter, there are some 16502 buildings in "A" Category, 1491 buildings in "B" Category and 1651 buildings in "C" Category.

14. Chapter VIII of MHAD Act provided for repairs and reconstruction of dilapidated buildings. Under section 88 from Chapter VIII of the MHAD Act, Mumbai Housing and Area Development Board was supposed to undertake structural repairs of the buildings, which were in ruinous condition and likely to deteriorate and fall. However, section 88(3) provides that where the cost of the structural repairs exceeded Rs.1200/- per sq.m., the Board may not consider such buildings for repairs and issue a certificate to that effect to the owner of the buildings and affix it on the building for the information of occupiers and then proceed to take action as provided in this Chapter. Thereafter where the occupiers were ready to contribute to the cost in excess of Rs.1200/- per sq. metre, the Board may carry out the structural repairs, for which a provision is made in section 89 of the MHAD Act. This will mean that otherwise the steps for reconstruction will be taken by acquiring the property as provided in sections 91 and 92 of this Chapter. Section 91 provides for reconstruction where a building suddenly collapses or becomes

inhabitable due to fire, torrential rain or tempest or otherwise. Section 92 lays down the procedure for acquisition where however a building suddenly collapses.

15. It is not disputed that there was not much progress in the matter of repairs and/or the reconstruction by this procedure. Therefore, some times in the year 1981, the Government appointed a committee under one Mr. Ajit Kerkar to consider the problems of dilapidated buildings and slums. The Kerkar Committee, however, emphasised that there should be a shift from reconstruction of individual buildings to the redevelopment of the entire localities and the formulation of a programme of urban renewal. It was of the view that otherwise there would be no major improvement in the quality of life of people living in the buildings in the neighbourhood. It is common case that the MHADA found it difficult to put in adequate funds for acquisition of properties for reconstruction under Chapter VIII of the MHAD Act and, therefore, Chapter VIII-A was introduced in the MHAD Act. The provisions of this Chapter are notwithstanding what was provided in Chapter VIII as stated in section 103-B of Chapter VIII-A. The provisions under this Chapter were to operate when 70% of the occupiers came together and approach the Government to acquire the property. They assured to contribute towards the acquisition and take

steps since the landlords were not cooperating. Under the scheme of this Chapter, the developed buildings were to be given FSI 2.

16. These provisions also did not receive adequate response. On 25th March 1991, the Development Control Regulations were notified for Greater Mumbai. D.C. Regulation 33(7) thereunder provided for reconstruction or redevelopment of cessed buildings in the island city by co-operative housing societies or of old buildings belonging to the Corporation. This D.C. Regulation 33(7) provided for old consumed FSI or FSI 2 whichever is higher. This DCR was further amended on 25th January 1999 to provide FSI of 2.5 on the gross plot area or the FSI required for rehabilitation of the existing tenants plus incentive FSI as specified in Appendix III to these Regulations. This amendment was brought about after the report submitted to the State Government by a Study Group under the chairmanship of Shri D.M. Sukhtankar, former Municipal Commissioner and who is Respondent No.4 herein. The Study Group has submitted its report in July 1997 leading to the amendments in the year 1999. This D.C. Regulation 33(7) has been further amended by adding a new clause with effect from 27th February 2004 whereby apart from the Corporation buildings, those of Department of Police, Police Housing Corporation, Jail and Home Guard of Government of Maharashtra constructed

prior to 1940 were also covered under this clause for the extra FSI.

17. It is the case of the Petitioners that there has been a gross misuse of this amended D.C. Regulation 33(7) when applied to private buildings with which the petition is concerned. The Petitioners submit that this amended D.C. Regulation 33(7) has been misused to pull down buildings which are otherwise in good condition merely because they were constructed prior to 1940. It is their further case that there are no guidelines under the D.C. Regulations to lay down as to who are the tenants or occupiers who are eligible to be protected under these D.C. Regulations. The Petitioners have cited a number of instances of such misuse. It is their case that builders and developers and people with muscle power are dishousing genuine tenants / occupiers. The number of tenants / occupiers is inflated by creating bogus tenancies to claim extra FSI. The consequence of all this is that there is going to be unjustified and tremendous increase in the population in the island city causing further strain on its infrastructure. It is the case of the Petitioners that the extra FSI as per the amended D.C. Regulation 33(7) is meant for the reconstruction of unsafe and dilapidated buildings only and not for all the 16,502 "A" category cessed buildings. The dilapidated buildings are supposed to be

just about 10% of them. The Petitioners therefore pray through prayer clause (a) that if the D.C. Regulation 33(7) is to be read to operate / apply to grant additional FSI, even for reconstruction of structurally strong sound cessed buildings which are not in danger of collapse, to that extent the said Regulations be quashed and set aside. Alternatively, they seek a declaration through prayer (b) that D.C. Regulation 33(7) be declared applicable to only those cessed buildings which are in dilapidated and structurally unsafe / unsound condition, which fact may be certified by a panel of experts. Amongst other prayers, they have a specific prayer (f) to challenge the reduction in the marginal open space requirement for the buildings under D.C. Regulation 33(7) read with Appendix III from what is provided for the buildings under the other Regulations.

18. The submission of the contesting Respondents, on the other hand, is that D.C. Regulation 33(7) is applicable to all "A" Category cessed buildings which are constructed prior to 1940. Wherever 70% of the tenants / occupiers of such buildings come together along with their landlord for redevelopment of their property, they were entitled to get this extra FSI. This will provide houses with minimum 225 sq.ft. free of cost to all those in these pre-1940 buildings. Many of them are otherwise cramped in still smaller tenements. According to the Respondents, the benefit

could not be restricted only to the old and dilapidated buildings. There is no such restriction contemplated under D.C. Regulation 33(7). In fact, they submitted that it will be unfair to make any such classification and that is not contemplated under the provisions.

19. To examine the rival submissions, we will have to refer to relevant provisions of the MHAD Act and the Regulations.

RELEVANT PROVISIONS OF MHAD ACT:

. As far as the MHAD Act is concerned, the provisions of Chapter VIII and VIII-A are relevant for our purposes. **Chapter VIII** deals with repairs and reconstruction of dilapidated buildings and Chapter VIII-A deals with acquisition of cessed properties for cooperative societies of occupiers. Section 76 from Chapter VIII lays down the duties of the Board relating to repairs and reconstruction of relevant buildings. Sub-clauses (a) and (d) thereof are relevant for our purpose. They read as follows:-

> **Duties relating to repairs and reconstruction of dilapidated buildings**:
>
> "76. Subject to the provisions of this Chapter, it shall be the duty of the Board.-
>
> (a) to undertake and carry out structural

repairs to buildings, in such order of priority as the Board, having regard to the exigencies of the case and availability of resources, considers necessary, without recovering any expenses thereof from the owners or occupiers of such buildings;

(b) .....

(c) .....

(d) to move the State Government to acquire old and dilapidated buildings and which are, in the opinion of the Board, beyond repairs, and to reconstruct or to get reconstructed new buildings thereon for the purpose of housing as many occupiers of those properties as possible, and for providing alternative accommodation to other affected occupiers."

20. Section 82 from this Chapter VIII provides for levy and collection of the Mumbai Building Repairs and Reconstruction Cess for giving effect to the purposes of Chapter VIII. Section 83 provides that certain lands and buildings are exempted from payment of this cess. As stated earlier, they are principally the buildings or lands vested or leased in to the Central Government, State Government, Mumbai Municipal Corporation, MHADA, Mumbai Port Trust, properties leased to the public trust and exclusively occupied for public worship or for

education purposes, cooperative housing societies, buildings exclusively in occupation of the owners, etc. Section 84 gives the classification of these cessed category buildings into three categories "A", "B" and "C", i.e. buildings erected before 1/9/1940 (Category "A"), buildings erected between 1/9/1940 and 31/12/1950 (Category "B") and buildings erected between 1/1/1951 and the date immediately preceding the date on which the Bombay Building Repairs and Reconstruction Board came into force, i.e. 30/12/1969.

21. Section 88 provides for structural repairs. This section is relevant for our purpose. It reads as follows:-

> **Board to undertake structural repairs to buildings which are in ruinous condition and likely to deteriorate and fall**:
>
> "88. (1) Subject to the other provisions of this Chapter, where the Board on consideration of the information given by the Municipal Commissioner, or a report of its officer authorised for the purpose, or other information in its possession, is satisfied that any building, which is occupied by persons, is in such a ruinous or dangerous condition, that it is imminently likely to fall unless structural

repairs which will render it fit and safe for habitation, are urgently done, then in such cases, the Board shall, subject to the provisions of sub-section (3), undertake such repairs to that building.

(2) The Board may prepare a list of such buildings setting out the order of priority or urgency in respect of which structural repairs are necessary, and may undertake simultaneously or in such order of priority the structural repairs according to the exigencies of the case and its resources.

(3) If the Board is of opinion that -

. (a) the cost of structural repairs to a building will exceed [one thousand two hundred rupees] per square metre, or

. (b) the cost of structural repairs to a building will exceed [one thousand two hundred rupees] per square metre but the size of the land on which such building is standing is such that for some reason or the other it would not be possible or economical to erect any new building thereon and there is an adjoining building but the cost of structural repairs to

such building does not exceed [one thousand two hundred rupees] per square metre;

then in cases falling under clause (a) or clause (b) the Board, notwithstanding anything contained in this Chapter, may not consider such building or buildings for repairs and may issue a certificate to that effect to the owner or owners thereof, as the case may be, affix a copy of the relevant certificate in some conspicuous part of the building or buildings for the information of the occupiers and proceed to take action as provided in this Chapter:

Provided that, in cases of special hardship, the Board may, on such terms and conditions as it may deem fit to impose, consider a building for structural repairs even if the cost of such repairs is likely to exceed the limit aforesaid:

Provided further that, where in any case the occupiers of a building undertake that they shall bear the cost of such repairs which are in excess of [one thousand two hundred rupees] per square metre and abide by such terms and conditions for payment of the excess cost to the Board as it may think fit to impose, the Board may carry out structural repairs to such building.

(4) The Municipal Commissioner shall, from time to time, send to the Board, full particulars of the buildings which are in a ruinous or dangerous condition and the condition of which is such that they are likely to fall if structural repairs are not urgently undertaken or in respect of which he has served notice under section 354 of the Corporation Act, but the same have not been complied with."

(Note: The earlier figure has been revised to Rs.1200/- by amendment of 2005.)

22. Section 89 deals with the procedure before undertaking structural repairs. Section 90 imposes responsibility of providing temporary accommodation pending structural repairs. Section 91 provides for the mechanism where a building suddenly collapses or becomes uninhabitable and the process for going for reconstruction. Section 92 deals with the proposal for acquisition.

23. **Chapter VIII-A** deals with acquisition of the cessed properties for cooperative societies of occupiers. Section 103-A therefrom provides that this Chapter will apply to all the cessed buildings which were erected prior to 1st September 1940 and classified as belonging to Category "A" though the proviso of it lays down that where more than 50% of the tenants are

using the premises for commercial or non-residential purposes, this Chapter will not apply. Section 103-B clearly lays down that this Chapter is independent of the earlier Chapter VIII. Sub-section (1) of section 103-B is relevant for our purpose, which reads as follows:-

> **Acquisition of cessed property for co-operative societies of occupiers**:
>
> "**103-B. (1)** Notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contracts, judgment, decree or order of any Court or Tribunal to the contrary, a co-operative society formed or proposed to be formed under the provisions of the Maharashtra Co-operative Societies Act, 1960 by not less than seventy per cent of the occupiers in a cessed building may by written application request the Board to move the State Government to acquire the land together with the existing building thereon or where the owner of the building does not own the land underneath or appurtenant to such building but holds it as a lessee or licensee, or where any person holds the building or the land underneath or appurtenant to such building or both under a lease or licence, then to acquire the right or

> interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building thereon (hereinafter in this Chapter referred to as "the land"), in the interest of its better preservation or for reconstruction of a new building in lieu of the old one and intimate their willingness to pay the amount of such acquisition as may be determined under the provisions of this Chapter and to carry out the necessary structural and other repairs or, wherever necessary, to reconstruct a new building, as the case may be, at their own cost."

Section 103-H from this Chapter provides that in no case, the FSI of the building to be reconstructed shall exceed FSI 2 or the consumed FSI whichever is less.

24. Before we proceed further, it will be desirable to look to the concept of FSI.

> The Floor Space Index is defined under D.C. Regulation 33(7) as the quotient of the ratio of the combined gross floor area of all floors, excepting areas specifically exempted under these Regulations to the total area of the plot,

i.e.

$$\text{FSI} = \frac{\text{Total covered area on all floors}}{\text{Plot area}}$$

D.C. Regulation 32 deals with FSI in tenement density. Normal FSI for the island city is 1.33.

25. D.C. Regulation 33 deals with additional FSI which may be allowed to certain categories, such as -

(1) Road widening, construction of new roads (100%).

(2) Buildings for educational and medical institutions and institutional buildings (300% i.e. 1.33 x 4 = 5.32).

(3) Buildings of the Government, Semi-Government Offices and Public Sector Undertakings (1.33 x 2 = 2.66 i.e. 100%).

(4) Buildings of star category residential hotels (100% i.e. 1.33 x 2 = 2.66).

(5) Low cost housing of MHADA (Approx. 1.2 times i.e. 1.6).

(6) Reconstruction of buildings destroyed by fire / which have been declared unsafe, collapsed or demolished (1.33 or the existing area whichever is more).

(7) Construction or redevelopment by Co-operative Housing Societies, old buildings belonging to Corporation (2.5 or existing area + FSI required for rehabilitation + 50% of the existing area, whichever is more).

(8) Construction for housing the dishoused (2.4 times i.e. 1.33 x 2.4 = 3.92).

(9) Repair, reconstruction of cessed buildings under the Urban Development Scheme (1.33 x 2.4 = 3.99).

(10) Slum Rehabilitation Scheme - 33(10) (upto 2.5).

(11) Co-operative Housing Societies (2.5).

(12) Development of site and services to small sized tenements under ULCR (1.33), as per modifications to the Regulations.

(13) Development of MHADA flats with World Bank Assistance (1.2 times i.e. 1.6).

26. Some of the provisions of the other Regulations which are relevant in this behalf are as follows:-

(a) D.C. Regulation 29 stipulates that the side and rear open space requirement is a minimum of 3.6 metres for a residential buildings and 4.5 metres for a commercial building.

(b) D.C. Regulation 29(e) stipulates that for structures upto 24 metres height, the minimum open space would be 6 metres and for tower buildings exceeding 24 metres in height, the minimum open space would be 9 metres.

(c) D.C. Regulation 29(5) provides that in the island city, the front of the building shall be set back from a road by 3 metres to 10.5 metres (depending on the type of the road).

(d) D.C. Regulation 32 provided that FSI in the island city would be 1.33.

(e) D.C. Regulation 34 read with Appendix VII provided for Transferable Development Rights in the form of additional FSI being granted in lieu of surrender of land reserved for a public purpose.

(f) Having regard to the fact that the island city is congested and its infrastructure is overburdened, clause 10 of Appendix VII prohibited the use of TDR in the island city.

(g) Clause 11 initially totally prohibited the use of TDR in the three corridors adjoining the Western and Central Railways. Subsequently clause 11 has been amended to permit the use of slum TDR in the three corridors. However, having regard to the congested state of the island city, even slum TDR is not permitted to be used in the island city.

27. On this background, we refer to the provisions of **D.C. Regulation 33(7) along with Appendix III**.

"33(7). Reconstruction or redevelopment of cessed buildings in the Island City by Co-operative Housing Societies or of old buildings belonging to the Corporation or of old

buildings belonging to the Police Department.

For Reconstruction / redevelopment to be undertaken by Cooperative Housing Societies of existing tenants or by Co-op. Housing Societies of landlords and/or occupiers of a cessed buildings of "A" category in Island City, which attracts the provisions of MHAD Act, 1976 and for reconstruction / redevelopment of the buildings of Corporation and Department of Police Housing Corporation, Jail and Home Guard of Government of Maharashtra, constructed prior to 1940, the Floor Space Index shall be 2.5 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix-III whichever is more.

[**Note**: The development of land for Department of Police, Police Housing Corporation, Jail and Home Guard of Government of Maharashtra shall be permitted by the Commissioner after due approval of the committee mentioned in Note-3 below regulation 33(3)(A).] (Amended w.e.f. 27th February 2004.)

Provided, however, that with previous approval

of the Government, MHADA / Corporation shall be eligible to get additional incentive FSI over otherwise permissible FSI as specified in Annexure III of these Regulations.

Provided further that in cases of composite redevelopment scheme for plot having "A" category as also "B category cessed building, the above FSI shall be available.

Provided further that in cases of reconstruction/ redevelopment of buildings which have been declared as unsafe by the BHAD Board prior to monsoon of 1997, the above FSI will be available irrespective of category of cessed building.

Provided further that reconstruction/ redevelopment undertaken by proposed Co-operative Housing Societies of Landlords and/or Occupiers of cessed building of "B category, and where composite development is undertaken by different owners of 5 or more plots, the FSI required for Rehabilitation of existing tenants plus incentive FSI as specified in Appendix III will be available."

"APPENDIX III

Regulation for the reconstruction or redevelopment of cessed buildings in the Island City by the Landlord and/or Co-operative Housing Societies (D.C. Regulation No.33(7).

1. (a) The new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70 per cent of the occupiers of the old building.

(b) All the occupants of the old building shall be re-accommodated in the redeveloped building.

2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to the minimum carpet area of 20.90 sq.mt. (225 sq.ft.) and/or maximum carpet area upto 70 sq.mt. (753 sq.ft.) as provided in the MHAD Act, 1976. In case of non-resident occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old building.

3. The list of occupants and area occupied by each of them in the old cessed building shall be certified by the Mumbai Repairs and Reconstruction Board and the irrevocable written consent as specified in 1(a) above shall be certified by the Board.

4. The tenements in the reconstructed building shall be allotted by the landlord/ occupants' co-operative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction Board. The prescribed percentage of the surplus built up area as provided in the Table in the Third Schedule of the Maharashtra Housing and Area Development Act, 1976, shall be made available to the Mumbai Repairs and Reconstruction Board for accommodating the occupants in the transit camps or cessed buildings which cannot be reconstructed, on payment of an amount as may be prescribed under MHAD Act, 1976.

5. The FSI for rehabilitation of existing tenants / occupiers in a reconstructed building and incentive FSI that will be available shall be as under:-

. (a) In case of redevelopment of "A" category cessed building undertaken by landlord and/or Co-operative Housing Societies of landlord and/or occupiers, the total FSI shall be 2.5 of the gross plot area or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI, whichever is more.

. (b) In case of redevelopment of "B" category cessed building undertaken by landlord and/or co-operative Housing Societies of landlord and/or occupiers, the total FSI shall be the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI.

. (c) In cases of composite redevelopment of "A", "B" and "C" category cessed buildings declared as dangerous by the Board before Monsoon of 1997, FSI available for redevelopment undertaken by landlord and/or co-operative Societies of landlord and/or occupiers will be as available for "A" category cessed buildings vide sub-clause (a) above.

. (d) In cases of composite redevelopment undertaken by the different landlords and/or Co-operative Housing Societies of landlords

and/or occupiers jointly of 2 or more plots but not more than 5 plots with "A", "B" and "C" category cessed buildings the FSI permissible will be 2.5 or FSI required for rehabilitation of existing occupiers plus 60% incentive FSI, whichever is more:

Provided, however, that if the number of plots jointly undertaken for redevelopment is six or more the incentive FSI available will be 2.5 or FSI required of rehabilitation for occupiers plus 70% incentive FSI whichever is more.

6. The entire FSI available under clause 5 shall be allowed to be utilised on plot / plots under redevelopment scheme. However, if the owner/society so desire can avail the incentive FSI in the same plot or can avail the benefit of Transferable Development Rights to be used in suburbs or extended suburbs in accordance with the Regulations as given in appendix VII.

7. Construction or reconstruction of old building falling under reservation / zones contemplated in the Development Plan shall be permitted in accordance with the provision of notification No.TPB 4392/4080A/RDP/UD-11 dated

3rd June 1992 issued under Section 31 of the MR & TP Act.

. (a) Redevelopment/reconstruction in any zone shall be allowed to be taken in site without going through the process of change of zone. For the industrial user the existing segregating distance shall be maintained from the existing industrial unit.

. (b) Any plot under non-buildable reservations admeasuring only upto 500 sq.mts. may be cleared by shifting the existing tenants from that site.

. (c) The stipulation of 33 per cent of area under non-buildable reservation may be reduced by the Government / Commissioner to the extent necessary where there are height and such other restrictions.

. (d) For other buildable reservations on lands where guidelines approved by Government under Section 31 of the Maharashtra Regional and Town Planning Act are not available, built-up area equal to not more than 15 per cent area of the entire plot or 25 per cent of the area under

reservation in that plot, whichever is less, shall be made available free of cost for the Municipal Corporation or for any other appropriate Authority.

. (e) Where a Development Plan Road passes through redevelopment scheme area, the entire FSI admissible under this Regulations for the area of the road may be given in the same site, on the remainder of the plot.

. (g) Contravening structures in Town Planning Scheme Regulations shall also be included in the redevelopment scheme FSI for the same will be as under Development Control Regulations 33(15) or as provided in these Regulations whichever is more.

8. Relaxation in building and other requirements for rehabilitation:
Notwithstanding anything contained in these Regulations, the relaxations incorporated in Regulation No.33(10) of these Regulations shall apply.

9. 20% of the incentive FSI can be used for non-residential purposes otherwise permissible

in the Development Control Regulations.

10. (a) In case of redevelopment scheme already in progress, if full occupation permission has not been granted, then Co-operative Society of the landlords and/or the occupiers or of the Corporation building may convert the proposal in accordance with these Regulations subject to submitting structural stability certificate from the licensed Structural Engineer.

. (b) In case of redevelopment of buildings undertaken by MHADA, where construction is in progress, whether the area of new tenement should be 20.90 sq.mt. or otherwise, the question shall be decided by MHADA in each case. However, if area of tenements is not increased to 20.90 sq.mt., then development will have to be carried out as per approved plan and FSI.

11. The FSI, as in sub-regulation (7) of Regulation 33, should be allowed by the Commissioner only after Mumbai Repairs and Reconstruction Board is satisfied that the said redevelopment proposal fulfills all conditions to be eligible for the benefits under these regulations.

12. In case of the redevelopment of cessed buildings, the concessions regarding exclusion of areas from computation of FSI of general buildings stipulated in Regulation 35(2) of DCR for Greater Mumbai, 1991 shall apply.

13. Since the permissible FSI in clause 5 of this Appendix is dependent upon the number of occupiers and the actual area occupied by them, no new tenancy created after 13.6.1996 shall be considered. Further unauthorised constructions made in the cessed buildings shall not be considered while computation of existing FSI. However the occupier may be allowed to declare whether the tenement is residential or non-residential.

14. For smooth implementation of the redevelopment scheme undertaken by owners and/or Co-operative Housing Society of the occupiers, the temporary transit camps may be permitted on the same land or land situated elsewhere belonging to the same owner/ developer with the concessions permissible under SRS project under Regulation 33(10) of these Regulations. Such transit camps should be demolished within one

month from the date of occupation certificate granted by the Corporation for the reconstructed buildings.

[Note: All Regulations/modifications mentioned above shall not be applicable to the areas which are affected by Coastal Regulations Zone Notification issued by Ministry of Environment and Forest, Government of India vide Notification dated 19 February 1991 and orders issued from time to time.]"

28. As noted earlier, the petition has been filed out of the Petitioners' concern for the deterioration of the quality of life in the island city of Mumbai.

(a) They point out that there is already a tremendous pressure on the infrastructure of the island city since its population has already exceeded its estimated capacity. They fear that if D.C. Regulation 33(7) is read and implemented in the manner in which it is, it will worsen the situation. Their simple estimate is that the reconstruction of 16,500 buildings with the kind of FSI, which is permitted, will mean that the constructed area will go up by 60-70%. Correspondingly, the population will go up by about 3.25 lakhs.

(b) They pointed out that there is already a severe shortfall of water supply, almost to the tune of 550 million litres per day. The Municipal Corporation has declared that new constructions will not be supplied water connections till 2007.

(c) There is a chronic alarming shortage of open space/area requirement in the island city as against the international norm adopted by U.N. Development Agencies of 4 acres per thousand population. The 1964 Development Plan pointed out that only a standard of 0.5 acre per thousand population was feasible in the island city. Presently, the island city average is 0.3 acres per thousand population which will become worse.

(d) The road and rail transport situation is alarming. The trains are carrying passengers over 4500 as against lower capacity of some 2600. Same is the position of the public transport system. The roads are narrow and insufficient to carry the vehicles resulting a chaotic traffic jam during peak hours practically everyday.

(e) The Petitioners submit that there is no justification to have any such Regulation to give such excessive FSI. In their view, the Municipal Commissioner can exercise his discretion under D.C.R.

64 to give higher FSI in appropriate cases, to accommodate the tenants.

. For all these reasons, the first prayer of the Petitioners is that if D.C. Regulation 33(7) is to be read to operate to grant such FSI even for reconstruction of structurally strong sound cessed buildings, which are not in danger of collapse, then to that extent the said Regulation be quashed and set aside. The Petitioners submit that if so read, the provision of extra incentive FSI is unreasonable and the provision will be required to be set aside. They invoke Article 14 of the Constitution. They submit that there should be a cap on the incentive FSI, may be at FSI 4.

29. The Petitioners have also emphasised the absence of any guidelines for deciding the persons who are covered under the concept of "tenants" or "occupiers", who are eligible to get the accommodation in the reconstructed buildings, though it is stipulated that the persons concerned have to be tenants or occupiers as on 13th June 1996. They have pointed out a few cases, namely those of Imran Co-operative Housing Society, Siddesh apartment and Krishna Bhavan, where, according to them, the number of tenants/occupiers were inflated with a view to get more FSI by way of saleable component to accommodate these persons. This was however rebutted

by pointing out that as far as the concept of tenancy is concerned, it was defined under the Bombay Rent Act and now under the Maharashtra Rent Control Act, 1999. The concept of "occupier" is defined under section 2(25) of the MHAD Act and it was also pointed out that as far as the decision as to whether any person is a tenant or an occupier is concerned, is arrived at on the basis of public documents, such as electricity bill, voters' card, ration card apart from rent receipts, and that this is provided in the guidelines. Besides, it was pointed out that a few cases of misuse cannot be the basis of criticising the effort to rehabilitate the tenants/ occupiers of old buildings.

30. Mr.Chenoi referred to us a few judgments in this behalf. He first referred to a judgment of the Apex Court in **Usman Gani Khatri v. Cantonment Board of Pune - (1992) 3 SCC 455** in the context of the Pune Cantonment Building Bye-laws, 1988 where in para 29, the Apex Court has observed that the construction of highrise buildings for fulfilling the need of houses in big cities should always be subservient to building regulation and restriction made in larger interest of the inhabitants. He referred to the judgment in **Friends Colony Development Committee v. State of Orissa - (2004) 8 SCC 733** where in para 24, the Apex Court has observed that the structural and the lot area regulations have and do

achieve the larger purposes of public health, safety or general welfare.

31. **In a news item published in Hindustan Times titled "And Quit Flow Maily Yamuna - (2004) 9 SCC 569"**, the Apex Court has observed that increased density without corresponding increase in provision of services like water, power, circulation, park etc. would lead to making urban areas in Delhi uninhabitable and lead to ecological degradation and urban degeneration. In **V.M. Kurian v. State of Kerala - (2001) 4 SCC 215**, the deviations in the matter of side open spaces in the case of highrise buildings were held to be contrary to public health and safety.

32. The Respondents do not dispute that there is already a tremendous pressure on the infrastructure in the island city nor do they dispute that the population therein has crossed its optimum limit. Their submission however is that a subordinate legislation in the nature of the Development Control Regulations cannot be faulted on the basis of the generality of expectations. The State is concerned with the problem of a large number of old buildings and protecting the interest of the inhabitants thereof. At the same time, the State is also faced with a problem of economic crunch. In the given scenario, a way has been found out. An appropriate procedure for that was followed and the

suggestions and objections were invited before finalising the D.C. Regulations. The learned Advocate General placed reliance on the judgment of the Apex Court in **Pune Municipal Corporation v. Promoters and Builders Association - AIR 2004 SC 3502** to point out that unless unreasonableness or arbitrariness is pointed out in the matter of exercise of the legislative function, it is not open for the court to interfere.

33. We have considered these submissions. Although it is true that there have been allegations of misuse of these Regulations by inflating the tenancies and although the extra construction will add up to the existing difficulties faced by the citizens at large, the Development Control Regulations cannot be faulted on the basis of generality of expectations of a few citizens who have a different view or approach towards solving the problems. One cannot ignore that the Development control Regulations are in the nature of subordinate legislation. It is possible for the Petitioners to have their own view in respect of the problems which are sought to be remedied by a particular Regulation. The problem of excessive population or congestion, non-availability of open spaces, the pressure on the transport system, the inadequacy of water supply and the sewage system are not disputed by the Respondents. At the same time, in their view, the reconstruction as provided under the concerned D.C.

Regulation 33(7) is also an aspect to be taken care of. The rule makers have felt that it was necessary to give the extra FSI to accommodate the existing tenants and occupiers and also to attract the capital. In our view, it is a policy matter and if the State decides to adopt a particular policy and to pass the Regulations based thereon, unless there is ex-facie unreasonableness or arbitrariness in the manner in which the legislative exercise is done or the effect thereof, the Court is not expected to interfere. It is however material to note prayer (a) of the petition proceeds to seek invalidation of D.C. Regulation 33(7) insofar as it purports to operate/ apply and grant additional FSI even for the reconstruction of structurally sound cessed buildings which are not in any danger of collapse as is sought to be canvassed by the Respondents. The Petitioners, however, very much seek a declaration alternatively through prayer clause (b) that these D.C. Regulations are applicable only to those cessed buildings which are dilapidated and structurally unsafe/unsound and they seek a declaration in that behalf.

34. When we examine this alternate plea, to begin with, our attention has been drawn to the legislative history of the provisions in this behalf. It has been emphasised that the earliest Act for this purpose, namely the Bombay Building Repairs and Reconstruction

Board Act, was for the purposes of repairs and reconstruction of the old and dilapidated buildings only. Subsequently, it was repealed when the MHAD Act came to be passed which made provisions of repairs and reconstruction also to the old and dilapidated buildings which belong to the "A" Category, i.e. constructed prior to 1940. All the pre-1940 buildings were not sought to be covered. The State went for acquisition and reconstruction under Chapter VIII of the MHAD Act where the cost of reconstruction went above Rs.1200/- per sq.m. Where 70% of the occupiers came together and offered to bear the expenses, the State supported them by acquiring such old and dilapidated buildings under Chapter VIII-A, but gave FSI 2 only. A committee under one Mr.Moghe and Mr.Awale had recommended 33% additional FSI for the reconstruction of dilapidated buildings, but, while accepting their recommendations, the State Government made it clear that the scheme was confined to those buildings which are beyond economic repairs. This is seen from the report of the subsequent committee under Mr.Ajit Kerkar. In para 4.4 of his report, he has recorded as follows:-

> "The State Government’s Housing Department has suggested the following modifications:-
>
> (a) While accepting the Moghe Committee and

> Awale Committee recommendations for an additional 33 per cent FSI, the scheme be confined to those buildings which are beyond economic repairs."

It is material to note that the Municipal Corporation had also taken a position at that stage that such a relaxation cannot be granted to all the cessed buildings. Thus, in para 4.5 of the report by Mr.Ajit Kerkar, it is observed as follows:-

> "4.5 The basic criticism to the Moghe and Awale Committee reports has been that any additional FSI would add to the congestion of already congested areas of the City. The BMC has calculated that if such a relaxation was permitted to all buildings where the scheme was feasible (i.e. excluding reserved areas and buildings where BHADB FSI limit had already been exceeded), an additional population of 3.25 lacs could be expected. However, this assumes that all cessed buildings would be eligible for the scheme, which has not been the recommendation of any of the Committees. The BMC also claims that this would mean that the population projections

for the year 2001 on which utility services had been planned, would be exceeded; but natural population growth itself will exceed these projections far earlier."

35. While recommending that the emphasis should be on the development of the entire localities, this is what was observed by the Ajit Kerkar Committee in para 6.1 of its recommendation.

"6.1 The reconstruction of the majority of dilapidated buildings by retaining let alone increasing the existing population densities (and FSI's) will mean the perpetration of the problems faced by the inhabitants of such localities. Water supply will be problematic and sewerage systems, even if substantially augmented, would break down frequently. The upkeep and maintenance of such buildings would be poor as is already being experienced and major repairs of such buildings would be required frequently. Garbage clearance and sanitation would remain substandard. In effect, there could be no major improvement of the quality of

> the life of the people living in such buildings and neighbourhoods. The accent therefore has to shift from the reconstruction of individual buildings to the redevelopment of entire localities and the formulation of a programme of urban renewal."

36. The Sukhtankar Committee, which gave the subsequent report, recommended three changes in D.C. Regulation 33(7).

> (i) It recommended that FSI be increased to 2.5 of the consumed FSI plus incentive FSI.
>
> (ii) The above increased FSI was to be given for providing tenements of minimum 225 sq.ft.
>
> (iii) It provided for Transfer of Development Rights (TDR). Where the Municipal Corporation was acquiring any plot in the island city for public amenities etc.. instead of paying compensation, the Corporation would give the certificate of TDR which could be used in the suburbs.

The Sukhtankar Committee also however made it clear that

in no circumstances, the FSI should exceed more than 4 and it observed that if FSI of more than 4 will be permitted, a consequence will follow:-

> "It will be beyond imagination to consider as to what will be the state of affairs at that place regarding the open and vacant places, sunshine (light), ventilation and the total of the environment, urban facilities, traffic arrangement, fire fighting provisions, etc. and unfortunately if a fire breaks out in any such building, then for quenching the same the necessary facilities would be a problematic solution."

Mr.Chenoi submitted that we have to approach the provision made in the amended D.C. Regulation 33(7) on this background.

37. The case of the Petitioners has been that the basic purpose right from the passing of the Bombay Building, Repairs and Reconstruction Act until and including the amended D.C. Regulation 33(7) has been to protect and help the tenants / occupiers of only the dilapidated buildings which need urgent repairs by repairing them and by reconstructing them wherever repairs are not possible. Initially, the Board took it

upon itself to repair the cessed buildings. When it found it difficult to do it on its own, under Chapter VIII of the MHAD Act, it went for reconstruction wherever the cost of repairs increased and confining to structural repairs could not have been beneficial. In such cases, the alternative was to acquire the buildings. That was the mechanism under Chapter VIII of the MHAD Act. The title of this Chapter confines it to Repairs and Reconstruction of Dilapidated Buildings (only and not all old buildings). Since the Government found it difficult to raise the funds, it went for the participation of the occupants and wherever 70% of the occupants came together (and the landlord was not joining them) and offered to contribute, the Government supported such reconstruction by acquiring the property. In such a case, it was immaterial whether the cost of reconstruction was excessive, but the FSI permitted was only 2. There were difficulties in this method also and, therefore, the extra FSI was given under D.C. Regulation 33(7). That was to apply where 70% of the occupants came together along with the landlord and raised their own funds. It is the case of the Petitioners that this method was however available only for reconstruction of the dilapidated buildings and not for all pre-1940 cessed buildings. In this reconstructed building, the tenants/ occupiers were to get minimum 225 sq.ft. of the tenements free of cost.

The extra expenditure was to be arranged by selling the extra component available under the extra FSI. This mechanism has been devised basically because of financial crunch but the objective is confined to the buildings which have become old and dilapidated and for which the reconstruction was provided under the MHAD Act. It is the submission of the Petitioners that these provisions cannot, by any stretch of imagination, be read to cover all pre-1940 "A" Category cessed buildings, which are some 16,500 or thereabout. This will mean going beyond the limited objective for which the extra FSI was provided.

38. The submission of Mr.Chenoi was that D.C. Regulation 33(7) included only the reconstruction of cessed buildings of "A" Category which attracted the provisions of MHAD Act and the reconstruction of buildings of the Corporation. Now, by the amendment of 2004, reconstruction of the buildings belonging to the Department of Police, Police Housing Corporation, Jail and Home Guards constructed prior to 1940 are also added in the second part of the provision. He submitted that the petition was confined to the first part, namely the privately owned cessed buildings of "A" Category. According to him, the phrase "which attracts the provisions of the MHAD Act" will have to be given its straight meaning without making any words therefrom

superfluous. Once we say that we are concerned with reconstruction of cessed buildings of "A" Category, which attract the provisions of the MHAD Act, the intention of the rule makers is clear. They refer to the reconstruction of cessed buildings which are covered under the MHAD Act. This is a clear pointer to the fact that the State attempted to do this on its own earlier under Chapter VIII and, failing that, went for acquisition and reconstruction where 70% of the occupiers came together under Chapter VIII-A. This was because the cost of structural repairs went above Rs.1200/- per sq.m. and the only way out was reconstruction. The State found it uneconomical to do it on its own and, therefore, where the occupiers came together, it helped them. Inasmuch as this did not meet with large success, the State has gone for this regulation whereunder higher FSI will be given and it will mean repairs and reconstruction of only the old and dilapidated buildings and not all pre-1940 buildings.

39. The reports of the earlier committees are also pointed out to that effect and, according to Mr.Chenoi, on the one hand, the State wanted reconstruction of old and dilapidated buildings with the participation of the citizens along with the landlord, but, at the same time, it wanted to go in a phased manner and, in any case, did not want all the 16,500 buildings to be covered

thereunder if they were not old and dilapidated.

40. Mr.Kadam, the learned Advocate General, and Mr.Singhvi for the Municipal Corporation, on the other hand, submitted that there was no reason to restrict the beneficial provision only to the old and dilapidated buildings and the phrase "which attract the provisions of MHAD Act" has to be read only with "cessed buildings of "A" Category" and not with reconstruction. Mr.Kadam relied upon a judgment of the Apex Court in the case of **Mahadeolal Kanodia v. The Administrator General of West Bengal - AIR 1960 SC 936**. In the facts of that case, in the context of a West Bengal Act, the Apex Court held that the particular adjectival phrase qualifies the proximate substantive. That apart, they submitted that Mr.Chenoi's interpretation will mean reading the words "old and dilapidated" before the words "cessed buildings of "A" Category". Mr.Chinoi then submitted that if cessed buildings of "A" Category in island city are already mentioned in the MHAD Act, what is it that is additionally sought to be conveyed by the words "which attract the provisions of MHAD Act, 1976?" In his submission, the clause has to go with the word construction. To that, the answer of the Advocate General and Mr.Singhvi was that this phrase could be read only as a sort of clarificatory phrase.

41. That apart, it was submitted on behalf of the Respondents that there is no reason to make a distinction between the old and dilapidated buildings constructed prior to 1940 and the other buildings which are in good conditions though constructed prior to 1940. There are residents who are cramped into smaller tenements even in such pre-1940 good buildings and, therefore, the occupiers of these buildings also should get an opportunity to get tenements of minimum 225 sq.ft. free of cost. In their submission, there was no reason to make such distinction between good pre-1940 buildings on one hand and the old and dilapidated pre-1940 buildings on the other hand. That apart, they of course submitted that as far as the buildings of the Corporation and the State Government's Police Department are concerned, they were not required to be old and dilapidated. The requirement for them was that they should be prior to 1940. Therefore, even the privately owned pre-1940 buildings should be deemed to be covered even if in good condition.

42. With respect to this last submission, Mr.Chenoi stated that the petition was confined only to the private sector buildings though, in his submission, even such a benefit to the Corporation or the Government buildings will mean an unjustified classification. We are not required to go into that question since the

Petitioners have not raised it as fairly accepted by Mr.Chenoi. It could be argued on behalf of the Municipal Corporation and State that there is a reasonable classification as far as their buildings are concerned. That apart, they are not cessed buildings. It is however possible to argue, as submitted by Mr.Chenoi, that even for them such a concession cannot be explained. In any case, this submission of the Respondents cannot be permitted to be used to expand the scope of the first part of D.C. Regulation 33(7) if it was meant for a particular limited purpose. We are of the view that merely because the requirement of the buildings being dilapidated is not mentioned in the second part, it cannot be read as excluded from the first part.

43. Mr.Singhvi, learned counsel for the Municipal Corporation, submitted that the provisions of the MHAD Act have been upheld by the Apex Court on the touch-stone of the directive principles in **State of Maharashtra v. Basantibai - AIR 1986 SC 1466**.

44. The arguments of the learned Advocate General and Mr.Singhvi for the Municipal Corporation have been adopted by Mr. Subramaniam, Mr. Reis and Mr.Devarajan appearing for various interveners though they have supported the same additionally. Mr.Shashikant Patil,

an Architect by profession, on the other hand, supported the petition.

45. We have noted the submissions of the learned counsel. The controversy turns around the question as to how one reads read the phrase "which attracts the provisions of MHAD Act". It has been a basic principle of interpretation that rules are not to be read to make any provisions superfluous. That apart, the phrase "which attract the provisions of MHAD Act" has to be read with the words "reconstruction / redevelopment", for the reason that when it comes to the second part of this clause, which is concerning the buildings of the Corporation or of the Government, the terms "reconstruction / redevelopment" are used again. Therefore, what is contemplated in both the parts of this regulation is reconstruction / redevelopment. It is also material to note that the buildings, which are covered in the latter part, are not covered under the MHAD Act in the sense that they are not required to pay any cess. Therefore, as against the buildings of the Corporation or of the State Government, which are in the latter part, the buildings in the first part are referred to as those which attract the provisions of the MHAD Act. The words "which attract the provisions of the MHAD Act" cannot be read only with "cessed buildings of "A" Category in the island city". They will have to

be read along with reconstruction of cessed buildings of "A" Category. Nor can we say that the words "which attract the provisions of the MHAD Act" are superfluous. They have a relevance in the sense, as stated above, that they distinguish the privately owned buildings falling in the first category from those in the second category which are owned by the Corporation or the State Government. Mr.Singhvi had submitted that the methods in Chapters VIII and VIII-A cannot be extended beyond them. However, if the rule makers have so done it by specifically referring to the MHAD Act, we cannot ignore it.

46. That apart, as stated above, the history of the legislation is also clear, namely that the Kerkar Committee as well as the Sukhtankar Committee were both aware of the likelihood of the problems which would otherwise arise. If all the buildings, which are in good conditions, are permitted the reconstruction with such an extra FSI, it will lead to extra pressure on all the facilities and infrastructure adding to the problem not merely of other citizens, but of those who will be occupying those buildings after their reconstruction. That apart, in the matter of reconstruction of these buildings, a number of departures are permitted such as those concerning the side and the front open spaces. They need not have any parking facility and only if

their height is above 24 metres, then they will have the required fire fighting arrangement. The recreational space meant for them is reduced. In our understanding, this can be permitted only to the exceptional category where the buildings are old and dilapidated and to accommodate the residents of such buildings, this extra FSI will be available.

47. The submission of the Petitioners deserves to be accepted for one more reason. The provisions of the Bombay Building Repairs and Reconstruction Board Act were challenged in the Apex Court and the judgment was rendered in the case of **Vivian Ferreira v. Municipal Corporation of Greater Bombay - AIR 1972 SC 845**. The landlords, whose buildings were in good condition, had challenged the application of the provision of cess to their buildings and which may not require the benefit of repair or reconstruction. In para 30 of this judgment, the Apex Court in terms held that "the primary object of the Act is not to repair all buildings subject to cess but to prevent the annually recurrent mischief of house collapses and the human tragedy and deprivation they cause". In para 26 also, the Apex Court observed that the Legislature had two alternatives; the first was reconstruction of large sections of the city and replacing new buildings in place of the old, and the second was the preservation and prolonging the life of

the existing structures by carrying out structural repairs and alterations therein. If the Legislature thought it best in the circumstances to choose the second instead of the first and confined its attention to the existing structures, no challenge on the ground of discrimination or arbitrariness can legitimately be made. These old buildings, which were to be repaired, are now being reconstructed. That has been the scheme all throughout.

48. While interpreting this provision, it is also material to refer to the third proviso to D.C. Regulation 33(7). The principal part of the provision clearly speaks of the "A" Category buildings, but the third proviso says that in cases of reconstruction of buildings, which have been declared as unsafe by Bombay Housing and Area Development Board prior to monsoon of 1997, the above FSI will be available irrespective of the category of cessed building. This will mean that it will be available to Categories "B" and "C" also where they have been declared unsafe. When this third proviso is read with the principal part, it becomes clear that what is contemplated in the principal part are unsafe, dilapidated and old buildings. It is for that purpose that the scheme of reconstruction has been introduced. That is to emphasise the requirement of reconstructing the unsafe buildings. The third proviso indicates that

even if the building belongs to "B" Category or "C" Category, if it is unsafe, the FSI under D.C. Regulation 33(7) will be available. In our view, this provision, read with its historical background, makes it clear that it is available only to the old and dilapidated buildings, the reconstruction of which has become uneconomical. The benefit is not available to all "A" Category buildings as such.

49. The main object of the Regulation is not to provide a tenement of minimum size of 225 sq.ft. to those in smaller tenements. That is incidental to the reconstruction of old and dilapidated buildings. Reading any such objective will mean going outside the scheme of the provisions. As far as the buildings which are in good conditions and which are constructed prior to 1940 are concerned, the landlords of such buildings can certainly develop them on their own. If 70% of those occupiers come together, though without the landlord, they can approach the State Government under Chapter VIII-A. They will however get the FSI of 2 and not the extra FSI as under D.C. Regulation 33(7).

50. This is because one has to balance between the requirement of making a provision of reconstruction for those in the dilapidated buildings and the other requirement of avoiding crowding in the city. Both the

objectives are important and as can be seen from the reports of the committees preceding the D.C. Regulations or their amendment, the rule makers were conscious of both the requirements. The rule makers have made their decision in a particular manner and the rule will have to be read the way as suggested above. The preamble of the MHAD Act itself states in the 8th clause beginning with "And Whereas with a view to" that the object of the Act is comprehensive approach to housing development with sufficient attention to ecology, pollution, over-crowding and amenities required for leading a wholesome civil life. We cannot ignore it.

51. The Respondents referred to the judgment of the Apex Court in **Bombay Dyeing v. Bombay Environmental Action Group - (2006) 3 SCC 434** and drew our attention to various paragraphs to submit that such petitions must be filed at the earliest. Para 104 of this judgment, on the other hand, states as follows:-

> "104. A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the appellants that the courts cannot exercise their power of judicial review at all.

> By reason of any legislation, whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution, should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith."

Any interpretation other than what is accepted above will mean that though the Regulations were meant for one purpose, now they will be used for another purpose. That cannot be permitted. The purpose of providing larger housing was not contemplated at any time under these provisions. That being the position, it cannot be used as a ground to justify the reconstruction of all the buildings. This will mean going beyond the original statute.

52. If the interpretation of D.C. Regulation 33(7), as canvassed by the Respondents, is accepted, it will lead to arbitrariness apart from the same being founded

in unreasonableness. It is arbitrary for the reason that the dilapidated and unsafe buildings form a separate class within the "A" Category cessed buildings and the entire effort of the Legislature all throughout has been to take necessary protective steps for these buildings. The protection under this provision was not contemplated for the benefit of the buildings other than dilapidated, unsafe and old buildings right from the inception and it is very clear from the judgment of the Apex Court in Vivian Ferreira's case (supra). If the interpretation canvassed by the Respondents is accepted, all buildings of "A" Category will be granted this protection and benefit whether they are dilapidated or not. This will also lead to unequals being treated equally. The aforesaid approach of the Respondents is unreasonable for the reason that, as stated above, admittedly the existing infrastructure is unable to cater to the needs of the existing population. It is very clear that if all the "A" Category buildings are permitted the reconstruction with so much extra FSI, irrespective of their being dilapidated or not, it will worsen the situation in the island city. The approach canvassed by the Respondents is clearly unreasonable and unjustified on that count. On either of the counts, it will lead to infringement of Article 14 of the Constitution. On the other hand, once we see the objective behind the provision clearly which is to

assist the residents of such buildings by taking the measures which are contemplated, the provision stands to reason and becomes fully justified because it caters to the problem in hand immediately while not aggravating the other problems faced by the citizens. Only if it is looked at from this point of view, D.C. Regulation 33(7) will remain a valid and justified legislation. The approach of the courts has always to be not to invalidate a provision if it can be reasonably read. For the reasons stated above, while we do not declare the provision to be invalid, as is sought through prayer clause (a), we, at the same time, accept what is sought to be prayed through prayer clause (b) under the interpretation which we have found acceptable.

53. It was canvassed on behalf of the Respondents that over the period they are taking steps to augment the various infrastructure requirements such as the water supply, transport facilities, sewage system, etc. We must however note that all this has its own limits since the island city is situated at one end whereas the water supply is to be arranged from quite a distance and the transport system is already under severe pressure. Taking any such steps, whereby there is a sudden increase in the population in the island city, was not envisaged when the D.C. Regulations were framed. What was contemplated was to attend to those buildings which

became dilapidated and unsafe or which may become dilapidated and unsafe as the time passes by and not all the old buildings.

54. There is one more aspect which we must note. Firstly, as canvassed by the Petitioners that not all the pre-1940 buildings are dilapidated. Mr.Chenoi has in fact pointed out that a very large number of them situated in different parts of the town, such as Marine Drive, Colaba, Dadar, Matunga and Mahim, are all in good condition. Besides, it cannot be said that in all the pre-1940 buildings, the tenement are of an area of less than 225 sq.ft. If the basic objective behind the provision was to provide minimum carpet area of 225 sq.ft. to the tenants of all pre-1940 buildings, that would have been reflected in the reports leading to the framing of the D.C. Regulations or their amendment. This is an incidental provision brought in to reflect the new norms. In fact, no such statistics have been placed before the court. It is sought to be canvassed that it is presumed that all pre-1940 buildings have outlived their life and they need reconstruction. Prima facie, the facts are otherwise. In our view, the provision of D.C. Regulation 33(7) is quite clear. The phrase "which attracts the provisions of MHAD Act, 1976" is used meaningfully and cannot be ignored. It can only mean that the benefit of reconstruction and extra FSI

under the Regulations is available to those buildings of "A" Category which attract the provisions of the MHAD Act meaning thereby which cannot be repaired within the monetary limit specified under section 88(3) of the MHAD Act and none other. In our view, the provision is clear in this behalf and the various committee reports are a pointer towards the same and they have been referred only to place the background material on record and not to interpret the same.

MAINTAINABILITY:

55. The Respondents have challenged the maintainability of the petition. They have firstly submitted that the Petitioners have no locus and secondly that the petition suffers from delay and laches. As far as the locus is concerned, in our view, it is too late in the day for the State Government or the public bodies to prevent the citizens from approaching the constitutional authorities if they point out the violations of Article 14 of the Constitution or seek an appropriate interpretation of the relevant Regulations.

56. As far as delay is concerned, Mr.Chenoi has pointed out that until 13th May 2003, the Respondents were accepting that buildings, which were in excellent

condition, did not need reconstruction. He has enclosed to the petition the circular issued by the then Vice President of MHADA which says as follows in clauses (1) and (5) thereof:-

> "(1) First and foremost it should be seen whether the redevelopment of the property is actually required or not. There are cases where the buildings in question are in excellent condition with very few tenants and do not really need reconstruction. However, in order to claim the extra FSI of 2.5, the Builders/Developers persuade the existing tenants to give consent for NOC. We have to discourage such tendency of redevelopment of buildings which are in excellent condition.
>
> (5) Complaints have been received in certain cases that the rehabilitation flats constructed by the Builder are not allotted to some of the existing tenants. To ensure allotment of flats to the rightful owner it is necessary that the Builder hands over the new building with as many flats as there are existing tenants, to the Repair Board on completion of the building and the Board thereafter allots the flats to the tenants and put them in possession. This shall

ensure that each of the existing tenant gets his entitlement."

Strange enough, these two clauses were withdrawn by MHADA subsequently on 18th August 2005 giving an impression that what was stated in clause (1) was no longer accepted by MHADA. It is another matter that any such withdrawal can not take away the force of the observations therein. The aforesaid circular of 13th May 1993 is annexed to the petition. The withdrawal thereof was of 18th August 2004 and this petition has been filed on 15th October 2004. Mr.Chenoi submitted that being apprehensive of the approach of the Respondents, the petition became necessary.

57. It was also submitted that the Petitioners ought to have moved early when the Regulations were drafted objections were invited. As far as that aspect is concerned, in our view, the Petitioners have given sufficient explanation. They are individual citizens though the 1st Petitioner was the former Chief Secretary. It cannot however mean that he has to be a watch-dog all the time. It was pointed out on behalf of the Respondents that the Bombay Environmental Action Group had filed one petition earlier to challenge the Regulations of 1991, but it is pointed out by Mr.Chenoi that there was no challenge to D.C. Regulation 33(7) in

that petition.

58. For the reasons stated above, we hold that the petition is very much maintainable and we read the provisions of the first part of D.C. Regulation 33(7) to cover only the privately owned dilapidated buildings which require reconstruction and where the cost of structural repairs exceeds the monetary requirement specified under section 88(3) of the MHAD Act (viz. Rs.1200/- per sq. metre as of now).

59. In the circumstances, prayer (b) of the petition deserves to be accepted though not prayer (a) and D.C. Regulation 33(7) will have to be read to mean that only the dilapidated buildings of "A" Category which satisfy this requirement (and those declared unsafe prior to the monsoon of 1997 under 3rd proviso thereof) are covered under D.C. Regulation 33(7) and entitled to extra FSI provided therein.

60. As far as the challenge to the side spaces being reduced to half as against what is otherwise provided, it was submitted that the provision is totally unreasonable. The side spaces will now hardly be about 1.5 metres (about 5 feet) and for a building upto 24 metres, no separate fire fighting arrangement will be insisted. This will almost mean a building of ground

plus 7 floors. The fire engines will not be able to go inside. In our view, independently on the merits of this submission, it is required to be accepted. It was submitted by the Respondents that in the erstwhile buildings there was hardly any space between two such buildings and if one goes for a tower, i.e. above 24 metres, obviously the side space will increase and the fire fighting facilities will have to be provided. In our view, this is no answer to the safety of the occupants with height of less than 24 metres. We may not interfere into the reduction of the recreational space or not providing the parking facilities though that will also create difficulties for the residents of such buildings. Considering that there is so much of space crunch, we may not interfere into the decision of the rule makers in that behalf. However, having the side space of only 5 feet for buildings of the height less than 24 metres (of ground plus 7 floors) is on the face of it something difficult to substantiate. That provision of the D.C. Regulations will have to be held as arbitrary, unreasonable and violative of Article 14 of the Constitution. We have no option, but to accept prayer (f) to this extent. The requirement of reducing side spaces for the buildings to be reconstructed is bad in law and they will have to be provided with the minimum side spaces as required in the buildings on small plots, viz. 3.6 metres.

61. The Apex Court has observed in its order of 21st April 2006 that no third party rights will be created and it further observed that it will be for the High Court to deal with that aspect. This being the position, we direct, with a view not to cause prejudice to the investors, that those projects of reconstruction, which have already been approved, will proceed as it is. However, the buildings not having the certificate of the cost of structural repairs exceeding Rs.1200/- per sq.m. under section 88(3) of the MHAD Act will not be permitted reconstruction henceforth. For future, the certificate under section 88(3) of the MHAD Act, viz. that the structural repairs cannot be carried out within the monetary limits specified therein will be mandatory requirement whereafter if 70% of the occupants and the landlord come together, the benefit under Regulation 33(7) will be available and not otherwise. Similarly, in all such buildings to be reconstructed, the side spaces will be maintained at least as in the case of other buildings on small plots, viz. 3.6 metres.

62. Petition stands disposed of. All chamber summonses therein also stand disposed of. No order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)